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13 Nonparty Val de Loire, LLC

14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 \* \* \*

17 NML CAPITAL LTD.,

18 Plaintiff,

19 vs.

20 THE REPUBLIC OF ARGENTINA,

21 Defendants.

22 Lead Case No. 2:14-cv-00492-RFB-VCF

23 Member Case No. 2:14-cv-1573-RFB-  
24 VCF

25 **NONPARTY VAL DE LOIRE, LLC'S  
MOTION FOR STAY OF  
MAGISTRATE JUDGE'S ORDER  
[MEMBER CASE DKT. 39]  
PENDING OUTCOME OF  
OBJECTION TO MAGISTRATE  
JUDGE'S ORDER PURSUANT TO  
FED.R.CIV.P. 72 [LEAD CASE DKT.  
111]**

26 Nonparty Val de Loire, LLC ("VDL"), by and through its counsel of record, the law firm  
27 Kolesar & Leatham, hereby files its Motion for Stay Pending Outcome of Objection to  
28 Magistrate Judge's Order.

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This Motion is made and based upon the Memorandum of Points and Authorities herein, and any argument requested by the Court.

DATED this 23rd day of April, 2015.

# KOLEsar & LEATHAM

By /s/ Jason M. Wiley

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

As further detailed below, VDL submits that it need not petition the Court for a stay to include the disclosure of documents and related actions pursuant to subpoena of a non-party when the validity of said subpoena – and the requests therein – are still at issue and however, in light of NML’s inconsistency with prior practice and in an abundance of caution, VDL submits the following as Nonparty Val De Loire, LLC’s Motion for Stay of Magistrate Judge’s Order Pending Outcome of Objection to Magistrate Judge’s Order Pursuant to Fed.R.Civ.P. 72.

I.

## STATEMENT OF RELEVANT FACTS

## *The 123 Entities Matter*

1. In August 13, 2013, NML served subpoenas on 123 Nevada-based entities (“The 123 Entities”) pursuant to Fed.R.Civ.P. 45 and 69. *See generally* NML’s Motion to Compel [Lead Case Dkt. 1].

2. On September 3, 2013, The 123 Entities timely provided responses to these subpoenas. See The 123 Entities' Brief Regarding the Power of the Court to Compel Depositions of Nonparty Entities' Representatives Pursuant to the Federal Rules of Civil Procedure [Lead Case Dkt. 20], at ¶¶ 7 and 8.

1           3.     NML did not like those responses and, therefore, on April 1, 2014, or more than  
 2 six (6) months later, NML filed its Motion to Compel [Lead Case Dkt. 1].

3           4.     The 123 Entities were not represented by local counsel at the time and as such did  
 4 not file a Response or Countermotion to Quash. *See generally*, Lead Case Docket.

5           5.     Eventually, the undersigned assumed the representation of these 123 Entities. *See*  
 6 *generally*, Lead Case Docket.

7           6.     Through the summer of 2014, this Court held three (3) hearings regarding various  
 8 legal issues pertaining to NML's subpoenas to The 123 Entities. *See* Lead Case Dkts. 16, 28, 39.

9           7.     Ultimately, on August 11, 2014, this Court entered its Order granting NML's  
 10 Motion to Compel ("The 123 Entities Order"). *See* The 123 Entities Order [Lead Case Dkt. 36].

11           8.     On August 27, 2014, The 123 Entities timely filed their Objection to Magistrate  
 12 Judge's Order. *See* The 123 Entities' Objection [Lead Case Dkt. 40].

13           10.    At that time, The 123 Entities did not file a corresponding Motion to Stay. *See*  
 14 *generally*. Lead Case Docket.

15           11.    The 123 Entities' Objection is currently pending before the District Judge. *See*  
 16 *generally*, Lead Case Docket.

17           12.    During the subsequent seven (7) plus months, NML has not pressured The 123  
 18 Entities in the slightest to produce any documents arguably responsive to the subject subpoenas.

19 ***The VDL Matter***

20           13.    On August 27, 2014, the same day The 123 Entities filed their Objection, NML  
 21 served nonparty VDL with a subpoena. *See* VDL's Errata to Motion to Quash [Member Case  
 22 Dkt. 5], at Exh. A thereto.

23           14.    Like the disputed 123 Entities subpoenas, the VDL subpoena was issued based on  
 24 Fed.R.Civ.P. 45 and 69. *See* VDL's Errata [Member Case Dkt. 5], at Exh. A; *see also* NML's  
 25 Response and Cross-Motion [*sic*] to Compel [Member Case Dkts. 8 and 10].

26           15.    VDL, which was represented by counsel at the time (unlike The 123 Entities),  
 27 timely filed a Motion to Quash [Member Case Dkt. 1], to which NML timely filed its Response  
 28 and Cross-Motion [Member Case Dkts. 8 and 10].

19. On March 9, 2015, this Court entered its Order: (a) denying VDL's Motion to Quash and granting NML's Cross-Motion to Compel.<sup>1</sup> *See* VDL Order [Member Case Dkt. 39].

21. Thereafter, VDL timely filed its Objection to Magistrate Judge's Order with the District Judge.<sup>2</sup> *See* VDL's Objection [Lead Case Dkt. 111];

22. VDL, MF Nevada, newly embroiled nonparty Mossack Fonseca & Co., and NML recently stipulated to extend the remaining briefing schedule as to VDL's Objection. *See* Stipulation [Lead Case Dkt. 114].

23. Inconsistent with its inaction on The 123 Entities Order [Lead Case Dkt. 36], NML demanded immediate production of documents by both VDL and MF Nevada (which also is in the possession of certain of VDL's documents and information).

II.

## LEGAL ANALYSIS

In discussions between counsel aimed at avoiding this motion practice, NML has cited authorities relying heavily on judicial economy policy grounds to reject VDL’s (and MF Nevada’s) requests for status quo ante pending the District Judge’s decision on VDL’s Objection to Magistrate Judge’s Order [Lead Case Dkt. 111] and to support NML’s demand for immediate production of documents.<sup>3</sup> On further review, however, these authorities are inapplicable to the specific circumstances of a Magistrate Judge’s Order regarding a nonparty’s obligations to respond to a subpoena in post-judgment enforcement in legal proceedings with no scheduled discovery or trial setting. As further explained below, VDL submits that the circumstances of

<sup>1</sup> The Magistrate Judge simultaneously partially granted and partially denied MF Nevada’s Motion to Quash (and, therefore, partially granted and partially denied NML’s Cross-Motion to Compel as to MF Nevada). In addition, the VDL Order [Member Case Dkt. 39] determined nonparty MF Nevada was the alter ego and/or agent of previously uninvolved nonparty Mossack Fonseca & Co. See Order [Member Case Dkt. 39], at 15:6-23:14. The VDL Order then seemingly compelled Mossack Fonseca to do some unexplained thing. As a result, Mossack Fonseca also filed a challenge to this Order with the District Judge. See Mossack Fonseca’s Motion to Intervene For The Limited Purpose of Contesting Service of Process and Jurisdiction [Lead Case Dkt. 106].

<sup>2</sup> MF Nevada also timely filed an Objection. *See* MF Nevada's Objection [Lead Case Dkt. 107].

<sup>3</sup> See LR IB 1-3; 28 U.S.C. § 636(b)(1)(A; *Trustees of N. Nevada Operating Engineers Health & Welfare, Trust Fund v. Mach 4 Const., LLC*, 2009 WL 1940087, at \*2 (D. Nev. July 7, 2009); *Hilton v. Braunschweig*, 481, U.S. 770, 776 (1987); *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.*, 2010 WL 10133699, at \*1 (N.D. Cal. Sept. 22, 2010); *White v. Burt Enterprises*, 200 F.R.D. 641, 642–43 (D.Colo.2000); *Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 124 F.R.D. 75, 79 (S.D.N.Y.1989).

1 the instant dispute, in particular NML's willingness to await the resolution of The 123 Entities' 2 Objection, the similarity of the issues presented in The 123 Entities' Objection and VDL's 3 Objection, and the likelihood of a hearing and decision by the District Judge in the near future, 4 dictate that the most prudent course is to stay the VDL Order pending District Judge's resolution 5 of the disputed legal and factual issues.

6 **A. VDL's Motion For Stay Should Be Granted.**

7       1. A Stay Of VDL's Production Is Warranted Based On The *Hilton* Factors.

8       In the *Mach 4 Const., LLC* case, 2009 WL 1940087 (D.Nev.), the District of Nevada 9 ostensibly adopted the four part test announced in *Hilton v. Braunschweig*, 481 U.S. 770 (1987), for 10 a stay pending appeal of a magistrate judge's non-dispositive discovery order. *See Mach 4 Const., LLC*, 2009 WL 1940087, \*2. That case actually dealt with a very specific, 11 distinguishable set of circumstances and legal issues. Nonetheless, assuming its applicability, a 12 stay in the VDL Matter is appropriate. The *Hilton* four factors are: (1) the movant is likely to 13 succeed on the merits of the appeal (or, in this case, Objection); (2) the movant will suffer 14 irreparable injury without the stay; (3) other parties will not be substantially injured if there is a 15 stay; and (4) the stay will not harm the public interest. *Hilton*, 481 U.S. at 776. In this case, all 16 four factors weigh in favor of VDL. 17

18       First, VDL will likely succeed on the merits of its Objection. As noted in VDL's 19 Objection, the Magistrate Judge made numerous clear errors as to both the pertinent facts and 20 applicable law. *See generally*, VDL's Objection [Lead Case Dkt. 111]. 21

22       Second, if there is no stay and VDL is forced to produce its private documents for NML's 23 perusal, VDL, an innocent nonparty, will be incapable of returning its private information to 24 private status. No amount of deleting and no confidentiality agreement offer from NML would 25 repair that shredded veil of privacy. 26

27       Third, the only other party, NML, would not be substantially injured if there is a stay. 28 NML has already sat by for more than eight months awaiting the resolution of The 123 Entities' Objection. Because that Objection has already been pending for so long, there is a high

1 likelihood that a hearing and/or decision by the District Judge will be forthcoming in the near  
 2 future. NML will not have much longer to wait.

3         Fourth, a stay will not only not harm the public interest, it will protect the public interest.  
 4 True, there is strong public interest in seeing judgments satisfied. But, just as true, there is a  
 5 strong public interest in protecting innocent nonparties.

6         2.     The Authorities NML Will Rely On Are Distinguishable From The  
 7 Circumstances Of The VDL Matter.

8         Each of the authorities cited by NML in inter-counsel communications, and likely to be  
 9 relied on by NML in briefing, is clearly distinguishable. Most obviously, each of the cases cited  
 10 deals with discovery disputes within the context of definite discovery and trial scheduling orders.

11         See *Litton Industries, Inc.*, 124 F.R.D. 75; *White*, 200 F.R.D. 641. The outcomes of these cases  
 12 rely heavily on policy concerns relating to judicial efficiency. See *Litton Industries, Inc.*, 124  
 13 F.R.D. 75 (S.D.N.Y. 1989); *White*, 200 F.R.D. 641; *Esparza v. Bridgestone/Firestone, Inc.*, 200  
 14 F.R.D. 654 (D.Colo. 2001). Second, the cases also pertain to discovery disputes between parties.  
 15 See *Litton Industries, Inc.*, 124 F.R.D. 75; *White*, 200 F.R.D. 641; *Esparza*, 200 F.R.D. 654;  
 16 *Mach 4 Const., LLC*, 2009 WL 1940087. Neither of these circumstances applies to the instant  
 17 dispute. Rather, the VDL Matter, like The 123 Entities Matter, is a post-judgment discovery  
 18 dispute proceeding regarding a nonparty's private affairs which have nothing to do with matters  
 19 still to be tried. There are no discovery or trial deadlines looming and/or in jeopardy in either  
 20 The 123 Entities or VDL Matters. See generally, Lead and Member Case Dockets.

21         Rather, this dispute is clearly distinguished from the cases relied upon by NML. . Just as  
 22 Rule 45 is separated from the traditional pre-trial discovery rules (Fed.R.Civ.P. 26 - 37), so too  
 23 should the subject Orders [Lead Case Dkt. 36 and Member Case Dkt. 39] be treated differently  
 24 than rulings on traditional pre-trial discovery disputes between parties.

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1           3.     Staying VDL's Production Would Also Be Consistent With Fed.R.Civ.P. 45's  
 2           Overarching Principle Of Protecting Nonparties.<sup>4</sup>

3           As Rule 45 and the related authorities make abundantly clear, the overriding principle  
 4           related to nonparties is to avoid unduly burdening them. *See Fed.R.Civ.P. 45(d); see also*  
 5           *Matthias Jans & Associates, Ltd. v. Dropic*, No. 01-MC026, 2001 WL 1661473 at \*2 (W.D.Mich  
 6           2001) ("[The Federal Rules] contain mandatory safeguards **for the protection of persons**  
 7           **subject to subpoena** ..." (emphasis added)); *Price Waterhouse LLP v. First American Corp.*  
 8           ("First American IV"), 182 F.R.D. 56, 62-63 (S.D.N.Y. 1998); *In re Edelman*, 295 F.3d 171, 178  
 9           (2d Cir.2002) (citing *Price Waterhouse LLP*, 182 F.R.D. at 63) (The purpose of Rule 45 is to  
 10           protect nonparty witnesses "from being subjected to excessive discovery burdens in litigation in  
 11           which they have little or no interest."); *Regents of Univ. of Cal. v. Kohne*, 166 F.R.D. 463, 464  
 12           (S.D.Cal. 1996) ("[t]he language of Rule 45(c)(3)(A) should be read literally"); *LT Int'l Ltd. v.*  
 13           *Shuffle Master, Inc.*, 2:12-CV-1216-JAD-GWF, 2014 WL 3734270 (D. Nev. July 29, 2014)  
 14           (Rule 45 is to be strictly and literally construed). Caution, therefore, would seem to be the more  
 15           appropriate approach regarding the instant Motion.

16           That caution would manifest itself in two (2) ways: (1) staying enforcement where  
 17           possible, especially where there is a timely Objection pending before the District Judge; and (2)  
 18           not requiring any security for such a stay. Again, VDL is a nonparty. VDL has no liability to  
 19           NML, whether established or even alleged. Nor would there be any prejudice to NML in issuing  
 20           a stay without security. First, NML has willingly sat by for more than eight months on a  
 21           substantially similar Objection by The 123 Entities. Second, as VDL (and The 123 Entities)  
 22           repeatedly made clear, NML has numerous unexplored and more direct avenues for obtaining the  
 23           same, or even more relevant documents and information. Third, The 123 Entities' Objection has  
 24           already been pending for more than eight (8) months. It is, therefore, likely that the disputed  
 25           legal and factual issues therein – and also germane to VDL's Objection – will be taken up by the

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 28           <sup>4</sup> In fact, the VDL Order [Member Case Dkt. 39] is silent regarding VDL's objections as to the undue burden and  
 overbreadth of the categories of requested documents in the subject subpoena. As such, VDL submits that, until  
 there is a determination by the District Judge, this prevailing principle of protecting nonparties from undue burden  
 should remain intact via an appropriate stay.

1 District Judge in the near future. There is no prejudice to NML in requiring it to wait a short  
2 while longer than it already has. Fourth, denying this Motion for Stay would obviate VDL's  
3 Objection and create the unacceptable circumstances of an innocent nonparty having no ability to  
4 unring the discovery bell.

5       4.     Staying VDL's Production Would Be Consistent With Procedure In The 123  
6       Entities' Case.

7           At no time in the more than eight (8) months since the Magistrate Judge's August 11,  
8 2014 Order in The 123 Entities Matter has NML even once demanded any production by The  
9 123 Entities. It is clear, therefore, that there is no real urgency on NML's part in recovering any  
10 documents or information from any nonparty it subpoenaed. After all, NML's motions to  
11 compel rely on portraying these 123 Entities as repositories of critical information directly  
12 traceable to Baez, the purported (though never charged and never convicted) ringleader in a  
13 money laundering scheme somehow related to Argentine assets. *See generally*, NML's Motion  
14 to Compel against The 123 Entities [Lead Case Dkt. 1]; *see also, generally*, NML's Response to  
15 VDL's Motion to Quash and Cross-Motion [*sic*] to Compel [Member Case Dkts. 8 and 10]. Yet,  
16 NML has done nothing with The 123 Entities Order. NML was already willing to abide so many  
17 months in waiting for the District Judge's ruling before demanding or expecting The 123  
18 Entities' documents. VDL submits that the interim VDL Order and subsequent and timely filed  
19 VDL's Objection should be grouped with the legal and factual challenges already before the  
20 District Judge, especially given the substantial overlap between The 123 Entities and VDL  
21 Matters.

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**CERTIFICATE OF SERVICE**

I hereby certify that I am employee of Kolesar & Leatham, and that on the 23rd day of April 22, 2015, I caused to be served a true and correct copy of foregoing **NONPARTY VAL DE LOIRE, LLC'S MOTION FOR STAY OF MAGISTRATE JUDGE'S ORDER [MEMBER CASE DKT. 39] PENDING OUTCOME OF OBJECTION TO MAGISTRATE JUDGE'S ORDER PURSUANT TO FED.R.CIV.P. 72 [LEAD CASE DKT. 111]** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Federal Rule of Civil Procedure 5(b) and Section IV of District of Nevada Electronic Filing Procedures, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities or U.S. Mail, posted prepaid on the date and to the address shown below:

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